Filed 4/24/06 P. v. Chambers CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DONALD CLARENCE CHAMBERS, Defendant and Appellant.	B182797 (Los Angeles County Super. Ct. No. VA075277)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Modified in part and affirmed in part.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Joseph P. Lee, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Donald Chambers was convicted, following a jury trial, of one count of first degree murder in violation of Penal Code[1] section 187, subdivision (a) and one count of attempted second degree robbery in violation of sections 211 and 664. The jury found true the special circumstance allegation that the murder was committed while appellant was engaged in the attempted commission of a robbery within the meaning of section 190.2, subdivision (a)(17). The jury also found true the allegations that appellant personally and intentionally discharged a firearm and personally and intentionally discharged a firearm causing death in the commission of the attempted robbery and murder, within the meaning of section 12022.53, subdivisions (b) through (d). The trial court found true the allegations that appellant had suffered two prior serious or violent felony convictions within the meaning of sections 667, subdivisions (b) through (i) and 1170.12 (the "three strikes" law), and sentenced appellant to life in prison without the possibility of parole, plus a consecutive 25-year-to-life enhancement term for the firearm use pursuant to section 12022.53, subdivision (d).

Appellant appeals from the judgment of conviction, contending that the trial court erred in refusing to instruct the jury with a modified version of CALJIC No. 2.92, and further contending that the felony-murder special circumstance is unconstitutional, and that the section 12022.53 enhancement and the parole revocation fine were improper under the facts of this case. We agree that the parole revocation order must be stricken. We affirm the judgment of conviction in all other respects.

Facts

On February 7, 2003, at about 2:40 p.m., an African-American man wearing a black cap and coat and carrying a gun entered the Check Into Cash business on Woodruff Avenue in Lakewood. He walked up to the business's security guard, Tupito Taualii, and told him to hand over his gun. Taualii refused. The two men struggled and the African-

---

[1] All further statutory references are to that code unless otherwise indicated.

American man's gun went off. He fired several more shots before Taualii was able to draw his own gun and shoot back. The African-American man then ran out the door.

Brooke Simmons, Raquel Lee and Blanca Estrella, all customers in the nail shop next door to Check Into Cash, heard gunshots, then saw an African-American man limp past the shop. The women all later identified this man as appellant.[2]

Griselda Thomas, who was waiting next to her disabled car for assistance, saw a man being dropped off by a white car. She saw him go into Check Into Cash, then heard hammer-like noises and a flash coming from the check store. She ducked. When she looked up, she saw the man leaving the check store. She later identified the man as appellant.

Greg Chisum was making a delivery to a business located in the same strip mall as the check store when he heard gunshots and ducked for cover. He saw an African-American man run along the sidewalk and get into a white Dodge Intrepid with paper license plates.

Los Angeles Deputy Sheriff Thomas Vernola came to the check store and discovered Taualii lying in the doorway bleeding. Taualii died from his gunshot wounds.

At about 2:59 p.m., Los Angeles Firefighter Patrick Cook and paramedics went to the 9700 block of Alondra in response to a call about a victim with a gunshot wound. They found appellant in the driver's seat of a white Dodge Intrepid. He had a gunshot wound to the top outer portion of his left thigh. Cook noticed an empty shell casing on the car's console. He asked appellant for this casing, and appellant gave it to him. The casing was a .357 magnum.

Los Angeles County Deputy Sheriff Donald Pollaro brought Chisum to Alondra. Chisum stated that the Dodge Intrepid appeared to be the same one he had seen earlier.

---

[2] Simmons selected two photographs from an eight pack line-up as resembling the limping man. One was appellant. At the preliminary hearing and trial, she identified appellant as the man. Lee selected two photographs of appellant from a line-up as being the limping man. Estrella selected appellant's photograph from a line-up and wrote that he "looks like the man" she saw after the shooting. She identified appellant at trial.

Ballistics expert Jeff Wallery examined three bullets recovered from the check store. A bullet found just outside the front door of the check store near Taualii's body, was either a .38 caliber or a .357 magnum caliber. A bullet found inside the store was a .9 mm. Taualii's gun was a .9 mm. The third bullet was not identifiable. The bullets recovered from Taualii's body were either .38 specials or .357 magnums.

Serological Research Institute forensic serologist Janet Hanniman conducted genetic testing on blood taken from the scene. A swab sample from one of the bullets contained genetic markings similar to appellant's DNA profile. Such a similarity occurs in the human population once in 12 million people.

Appellant presented evidence that a Sheriff's criminalist did not find appellant's DNA on three swabs submitted to him for testing.

Appellant's girlfriend testified that he called her sometime between 2:30 p.m. and 3:00 p.m. and told her that he had been shot. She told him to call Kaiser, then called 911.

Oscar Perez testified that he was working in a business in the 9700 block of Alondra when he noticed appellant honking his car horn. Perez approached the car and appellant asked Perez to flag down an ambulance. Appellant was not wearing a tan shirt or a white baseball hat. At some point before the paramedics arrived, a Dodge Durango pulled up and a man wearing what appeared to be a bullet-proof vest got out and looked inside appellant's car as if he were searching for something.

Appellant also presented the expert testimony of forensic psychologist Dr. Robert Shomer on the weaknesses of eyewitness identification.

Discussion

1. CALJIC No. 2.92

Appellant contends that the trial court erred in refusing to instruct the jury with his proposed modified version of CALJIC No. 2.92.

A defendant is entitled to "an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence. [Citation.]

The instruction should not take a position as to the impact of each of the psychological factors listed; it should also list only factors applicable to the evidence at trial, and should refrain from being unduly long or argumentative." (*People* v. *Johnson* (1992) 3 Cal.4th 1183, 1230.)

CALJIC No. 2.92 usually provides sufficient guidance concerning the factors to be considered in evaluating eyewitness identifications. (*People* v. *Johnson, supra*, 3 Cal.4th at p. 1230.) Defense counsel may suggest additional factors to supplement those in CALJIC No. 2.92. (*People* v. *Wright* (1988) 45 Cal.3d 1126, 1143.)

Here, one of the eight factors proposed by appellant was improper. Appellant proposed "Testimony of an expert regarding acquisition, retention or retrieval of information presented to the senses of a witness." This in effect endorsed appellant's expert's testimony, and so was improperly argumentative. (See *People* v. *Wright, supra*, 45 Cal.3d at p. 1143.)

The remaining seven factors were duplicative or redundant. Appellant proposed that the standard factor "Whether the witness had prior contacts with the alleged perpetrator" be modified by adding the phrase "or was unfamiliar to the witness." This proposed phrase was redundant. Appellant proposed the additional factors "The length of time the witness saw the perpetrator" and "The positions and distances between the witness and the perpetrator at various times." These are included in the standard factor "The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act." Another factor proposed by appellant was "The presence or absence of any circumstance that might focus or distract the witness' attention." This is included in the above two standard factors and the additional standard factor "The stress, if any, to which the witness was subjected at the time of the observation."[3] Appellant proposed the addition of "Fairness or suggestiveness of a photographic lineup." This is included in the standard factor "Whether the witness' identification is in fact the product of his/her own

---

[3] It could also be included in the standard factors "The cross-racial or ethnic nature of the identification" and "Whether the witness had prior contacts with the perpetrator."

recollection." Appellant also proposed "Whether the witness' memory was or was not affected by the intervening time and events." This is included in the standard factor "The period of time between the alleged criminal act and the witness's identification." Appellant proposed "At the time of the arrest, defendant was or was not dressed in clothing matching the description of the perpetrator." This is included in the standard factor "The extent to which the defendant either fits or does not fit the description of the perpetrator of the act."

Further, even assuming that the trial court erred in refusing the instruction, any error would be harmless. Appellant's counsel was able to present expert testimony on the reliability of eyewitness identification and cross-examine the eyewitnesses about factors relating to the reliability of the eyewitness identifications. The standard jury instruction essentially covered the factors which appellant wished the jury to consider. In addition, the trial court expressly told appellant's counsel that he could argue all of his proposed factors under the catchall factor "Any other evidence relating to the witness' ability to make an identification." (See *People* v. *Wright, supra,* 45 Cal.3d at pp. 1144-45.) The evidence against appellant was strong, even discounting the details of the four eyewitness identifications of appellant. Four eyewitnesses reported seeing an African-American man near or leaving the check-cashing business just after shots were heard. Three of them said he was limping. A fifth witness saw an African-American man get into a white Dodge Intrepid with paper license plates. Appellant was found soon after the robbery in a white Dodge Intrepid with paper license plates. He had a bullet wound in his leg. A .357 magnum casing was recovered from the car. A bullet recovered from the victim's body was either a .38 caliber round or a .357 magnum round. Appellant's DNA was found on a bullet recovered from the murder scene. Thus, we see no reasonable probability (or possibility) that appellant would have received a more favorable verdict if the trial court had instructed the jury with his proposed version of CALJIC No. 2.92.

2. Robbery-murder special circumstance

Appellant contends that the felony-murder special circumstance of section 190.2, subdivision (a)(2) requires nothing more than proving a first degree murder based on the felony murder rule. He further contends that since the special circumstance does not provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not, the circumstance constitutes cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. We do not agree.

As the California Supreme Court has explained, in *Lowenfield* v. *Phelps* (1988) 484 U.S. 231, the U. S. Supreme Court "made it plain" that the "triple use" of facts to support (1) the conviction of first degree murder on a theory of felony murder, (2) the finding of the felony-murder special circumstance, and (3) the imposition of the penalty of death did not violate the Eighth Amendment. (*People* v. *Marshall* (1990) 50 Cal.3d 907, 945-946.)

California law also allows the use of the same felony to qualify a defendant both for first degree murder and for a special circumstance justifying the death penalty. (*People* v. *Taylor* (2001) 26 Cal.4th 1155, 1183.)

We are bound by these decisions and so reject appellant's claim without further discussion.

3. Section 12022.53

Appellant contends that the trial court's imposition of a consecutive 25-year-to-life enhancement term violated section 654 and the merger doctrine of *People* v. *Ireland* (1969) 70 Cal.2d 522.

We have considered and rejected these contentions in *People* v. *Sanders* (2003) 111 Cal.App.4th 1371. Appellant disagrees with our reasoning in *Sanders*, but offers us no reason to reconsider our holding in that case.

In *Ireland*, the Supreme Court held that the felony-murder rule could not be applied when the only predicate felony which the defendant committed was assault,

because the assault was an integral part of the homicide. The Court found that to hold otherwise would relieve the prosecution of the burden of proving malice, as most homicide cases involve an assault. (*People* v. *Ireland*, *supra*, 70 Cal.2d at p. 539.)

We see nothing about a firearm enhancement which reduces the prosecution's burden of proving malice, or any other element of murder, and so in *Sanders* we found that the Ireland merger doctrine has no application to firearm enhancements. We noted that the *Ireland* merger doctrine has never been applied outside the context of felony murder and assault. (*People* v. *Sanders*, *supra*, 111 Cal.App.4th at p. 1374.) We also recognized that "[t]hus far, there is no authority extending the merger doctrine to enhancements." (*Ibid*.) That remains the situation two and a half years later.

Section 654 provides that "[a]n act or omission punishable in different ways by different provisions of the law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall be punished under more than one provision. . . ." The California Supreme Court has not yet addressed whether section 654 applies to enhancements. (See *People* v. *Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7. [declining to address the People's argument that section 654 does not apply to enhancements].)

In *Sanders*, we agreed with the three other Courts of Appeal which had found that section 654 does not apply to a single firearm enhancement to an offense committed by the use of a firearm, unless such use was a specific element of the offense. (*People* v. *Sanders*, *supra*, 111 Cal.App.4th at p. 1375.) Appellant disagrees with our conclusion in *Sanders*, but offers only one case decided after *Sanders* to support his position.[4] He contends that our Supreme Court's holding in *People* v. *Seel* (2004) 34 Cal.4th 535 "dramatically altered the perspective from which California views its historical treatment of 'sentencing enhancements" and supports his contention that section 654 applies to sentencing enhancements. We do not agree.

---

[4] To date, no Court of Appeal has disagreed with our conclusion in *Sanders*. Our Supreme Court has not addressed this issue.

The Court in *Seel* found that double jeopardy protection precluded retrial of a premeditation allegation. (*People* v. *Seel*, *supra*, 34 Cal.4th at p. 539.) The basis of this holding was the U.S. Supreme Court's holding that "any fact other than a prior conviction that increases punishment beyond the prescribed statutory maximum 'is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' (*Apprendi* v. *New Jersey* (2000) 530 U.S. 466, 494, fn. 19)" (*People* v. *Seel*, *supra*, 34 Cal.4th at p. 539.) "In other words, '*Apprendi* treated the crime together with its sentence enhancement as the "functional equivalent" of a single "greater" crime. [Citations.]' [Citation.]" (*Id*. at p. 539, fn. 2.) We see nothing in this holding that would indicate that section 654 applied to preclude imposition of a firearm enhancement to the crime of murder. To the contrary, under *Seel*, the murder in this case together with the firearm enhancement would be a single crime, and not subject to section 654.

Appellant also contends that even if section 654 does not apply to some enhancements, it applies in his case because a firearm enhancement is a lesser included offense of murder with a firearm. We do not agree. One offense is included in another offense if the legal elements of the lesser offense are included in the legal elements of the greater offense, or if the greater offense, as pled in the accusatory pleading, cannot be committed without also committing the lesser offense. Clearly, murder can be committed without using a firearm, and thus firearm use is not a lesser include offense under the legal elements test. Our Supreme Court has held that a weapons use enhancement allegation is not part of an accusatory pleading for purposes of defining lesser included offenses. (*People* v. *Woolcott* (1983) 34 Cal.3d 94, 96, 100-102.) Appellant notes that the dissent in *Woolcott* reached the opposite conclusion, and argues that the dissent is correct. We are bound by the majority's holding.

4. Subdivision (j) of section 12022.53

Appellant contends that the language of subdivision (j) of section 12022.53 bars the imposition of a 25-year-to-life enhancement in cases such as his, where the defendant

receives a sentence of life without the possibility of parole for his crime. We do not agree.

Section 12022.53, subdivision (j) provides in pertinent part "When an enhancement specified in this section has been admitted or found true, the court shall impose punishment pursuant to this section rather than imposing a punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment."

Appellant contends that "another provision of law," section 190.2, subdivisions (a)(3), (10) and (17), provides a sentence of life without the possibility of parole, "a greater penalty or longer term of imprisonment." He concludes that section 12022.53 therefore does not apply.

The California Supreme Court has now considered and rejected this argument. (*People* v. *Shabazz* (March 27, 2006, S131048) ___ Cal.4th ____ [2006 WL 759674; 2006 DJAR 3567].) A sentence enhancement of 25 years to life in prison under section 12022.53, subdivision (d), may properly be imposed in addition to a defendant's sentence of life in prison without the possibility of parole. (*Ibid*.)

5. Parole revocation fine

Appellant contends that the trial court erred in imposing a parole revocation fine. We agree.

As we have previously found, a parole revocation fine is not appropriate in cases which do not allow for the possibility of parole. (*People* v. *Oganesyan* (1999) 70 Cal.App.4th 11778, 1184-1185.) That is the situation here. Appellant received a sentence of life without the possibility of parole.

Respondent urges us to uphold the fine on the basis of *People* v. *Tye* (2000) 83 Cal.App.4th 1398. That cases involved the imposition of a parole revocation when the defendant received a suspended sentence and probation. We do not find it applicable to this case.

Disposition

The parole revocation fine of $500 is ordered stricken. The clerk of the Superior Court is directed to prepare an amended abstract of judgment reflecting this change and to deliver a copy to the Department of Corrections. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.